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## **How Modern Trends and Market Economics Have Rendered Anti-Ticket Scalping Legislation Obsolete**

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# HOW MODERN TRENDS AND MARKET ECONOMICS HAVE RENDERED ANTI-TICKET SCALPING LEGISLATION OBSOLETE

## INTRODUCTION

A search for “tickets” on eBay brings back 246,598 results.<sup>1</sup> The same search on StubHub brings back 34,230 results.<sup>2</sup> Attend any major sporting event and you will likely encounter people outside the venue that are both buying and selling tickets. These transactions—both through the Internet and face-to-face—construct the secondary ticket market,<sup>3</sup> where scalpers resell tickets to sporting or entertainment events “at whatever price the market will bear.”<sup>4</sup> Often, this market price is above the ticket’s face value, which creates benefits and harms. The secondary ticket market harms some consumers by, among other things, depriving them from acquiring tickets that they could otherwise afford if prices were kept at face value.<sup>5</sup> But the secondary ticket market can benefit other consumers who were unable to attain tickets initially at face value by providing them on the secondary ticket market.

In response to the harms caused by ticket scalping, many state legislatures have enacted anti-ticket scalping legislation.<sup>6</sup> Some states limit who can resell tickets at above face value by requiring ticket brokers<sup>7</sup>

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1. eBay, <http://ebay.com> (last visited Aug. 31, 2009) (enter “tickets” into the “Find” field)

2. StubHub, <http://www.stubhub.com> (last visited Aug. 31, 2009) (enter “tickets” into the “Search” field). StubHub is a leading ticket resale website.

3. This ticket market is “secondary” because the market involves the resale of tickets after the reselling party has already made the initial purchase. See Jasmin Yang, Comment, *A Whole Different Ballgame: Ticket Scalping Legislation and Behavioral Economics?*, 7 VAND. J. ENT. L. & PRAC. 111, 111 (2004).

4. *Id.*

5. See Paul J. Criscuolo, Comment, *Reassessing the Ticket Scalping Dispute: The Application, Effects and Criticisms of Current Anti-Scalping Legislation*, 5 SETON HALL J. SPORT L. 189, 198 (1995). “Congestion” around the venue, “harassment” of those attending the event, “misrepresentation of ticket prices,” and “fraudulent sale of tickets” are also consumer harms imposed by ticket scalping. *Id.* at 192.

6. *Id.* at 189.

7. In this Comment, the term “broker” refers to those who resell tickets within the boundaries of the governing state statute, or those organizations and individuals whose purpose is to resell tickets, although they might not be complying with statutory regulations. Even so, the term “ticket scalping” is used to describe the act of reselling a ticket, whether the seller is a broker of scalper.

to become properly 'registered'<sup>8</sup> or to receive permission from the venue owner.<sup>9</sup> Other states attempt to control ticket scalping by creating a buffer zone around the venue where the resale of tickets is prohibited,<sup>10</sup> or by controlling the price at which a ticket can be resold.<sup>11</sup> In general, these statutes aim to protect both consumers and original ticket sellers from the harms that are created by ticket scalping.<sup>12</sup> These aims are consistently cited by courts when they uphold anti-ticket scalping legislation against claims that the legislation violates due process and equal protection.<sup>13</sup>

Despite these statutes' attempts to regulate the secondary ticket market, the market continues to grow. In addition to Internet resale websites, professional sports teams and leagues have created their own Internet websites to capitalize on the secondary ticket market.<sup>14</sup> Indeed, ticket scalping has not been reduced by anti-ticket scalping legislation.

This Comment argues that anti-ticket scalping statutes are unnecessary and should be repealed because the policies and purposes supporting the statutes have been undercut by both modern developments in the ticket market and market economics. Part II of this Comment examines several anti-ticket scalping statutes, grouping them together according to the manner in which they attempt to control ticket scalping.<sup>15</sup> It also examines the purposes each group of statutes aims to achieve<sup>16</sup> and the various challenges to these stat-

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8. See, e.g., 720 ILL. COMP. STAT. 375/1.5(b)(1) (2008); N.J. STAT. ANN. § 56:8-27(b) (West Supp. 2009).

9. See, e.g., N.C. GEN. STAT. § 14-344 (1995).

10. See, e.g., ARIZ. REV. STAT. ANN. § 13-3718 (2001).

11. See, e.g., ARK. CODE ANN. § 5-63-201 (2005); WIS. STAT. § 42.07 (2008).

12. See Criscuolo, *supra* note 5, at 189.

13. See *People v. Patton*, 309 N.E.2d 572, 574 (Ill. 1974) (upholding the Illinois Ticket Scalping Act against a due process challenge); see also *State v. Leary*, 587 A.2d 85, 89 (Conn. 1991) (upholding a state anti-ticket scalping statute against an equal protection challenge).

14. The NFL teamed with TicketMaster prior to the 2008 season in order to create the NFL Ticket Exchange, an NFL-sanctioned online secondary ticket market. See Michael McCarthy, *NFL's Online Ticket Exchange Kicks Off*, USA TODAY, Aug. 7, 2008, at 12C. Ticket sellers will be allowed to set their own price when they sell tickets on the website. *Id.* Individual teams have also entered the secondary ticket markets (1) by accepting a flat fee from third-party vendors in exchange for allowing that vendor to be the preferred ticket reseller for that team, (2) by receiving a percentage of all tickets sold on the secondary market by a preferred ticket reseller, and (3) by setting up their own ticket exchange and collecting a percentage of all sales. See Anthony J. Dreyer & Mitchell P. Schwartz, *Whose Game Is It Anyway: Sport Teams' Right to Restrict (and Control) Ticket Resale*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753, 780-87 (2007).

15. See *infra* notes 26-55 and accompanying text.

16. See *infra* notes 56-76 and accompanying text.

utes.<sup>17</sup> Part III analyzes recent trends in both the primary and secondary ticket markets and how these trends undermine the purposes behind the statutes.<sup>18</sup> Part III also demonstrates how an economic analysis casts doubt on the necessity of regulating the secondary ticket market.<sup>19</sup> Part IV examines the problems that would exist in an unregulated secondary ticket market and discusses proposed federal legislation and other suggested solutions to those problems.<sup>20</sup>

## II. BACKGROUND

To understand why ticket scalping statutes are unnecessary and ineffective, it is first important to understand the statutes themselves and what they aim to do. Many states have sought to regulate the resale of tickets. Section A discusses the anti-ticket scalping statutes that exist in various states, classifying them according to their treatment of ticket scalping.<sup>21</sup> Section B then describes the purposes driving these statutes, namely, consumer welfare and the protection of primary ticket sellers.<sup>22</sup> Finally, Section C discusses constitutional challenges that have been made to various statutes that regulate ticket resale.

### A. *Current Anti-Ticket Scalping Legislation*

A majority of states have already enacted some type of legislation to control ticket scalping.<sup>23</sup> While each statute is aimed at reducing or

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17. See *infra* notes 77–81 and accompanying text.

18. See *infra* notes 99–171 and accompanying text.

19. See *infra* notes 175–192 and accompanying text.

20. See *infra* notes 197–231 and accompanying text.

21. See *infra* notes 25–55 and accompanying text.

22. See *infra* notes 56–76 and accompanying text.

23. Currently, twenty-eight states regulate the resale of tickets in some manner. ALA. CODE § 40-12-167 (2003); ARIZ. REV. STAT. ANN. § 13-3718 (2001); ARK. CODE ANN. § 5-63-201 (2005); CAL. PENAL CODE § 346 (West 1999); COL. REV. STAT. § 6-1-718 (2009); CONN. GEN. STAT. § 53-289 (2009); DEL. CODE ANN. tit. 11, § 918(a) (2007); FLA. STAT. § 817.36 (2008), *amended by* 2009 Fla. Sess. Law Serv. 1446 (West); GA. CODE ANN. § 43-4B-25 (2008); HAW. REV. STAT. § 440-17 (1993); 720 ILL. COMP. STAT. 375/1.5 (2008); IND. CODE § 25-9-1-26 (2004 & Supp. 2008); KY. REV. STAT. ANN. § 518.070 (LexisNexis 2008); LA. REV. STAT. ANN. § 4:1 (2003 & Supp. 2009); MD. CODE ANN., BUS. REG. § 4-318 (LexisNexis 2004); MASS. GEN. LAWS ch. 140, § 185A (2008); MICH. COMP. LAWS § 750.465(2) (1981); MISS. CODE ANN. § 97-23-97 (2006); N.J. STAT. ANN. § 56:8-27 (West Supp. 2009); N.M. STAT. § 30-46-1 (2004); N.Y. ARTS & CULT. AFF. LAW § 25.11 (McKinney Supp. 2009) (effective until May 2010); N.C. GEN. STAT. § 14-344 (1995); OHIO REV. CODE ANN. § 715.48 (LexisNexis 2008); 4 PA. STAT. ANN. § 202 (West 2008); R.I. GEN. LAWS § 5-22-26 (2004); S.C. CODE ANN. § 16-17-710 (Supp. 2008); VA. CODE ANN. § 15.2-969 (Supp. 2009); WASH. REV. CODE § 67.70.110 (2008); WIS. STAT. § 42.07 (2008).

controlling the resale of tickets, the statutes are not uniform in how they achieve that goal.<sup>24</sup>

### 1. *Permitting Sale Above Face Value by Certain Persons*

Some states regulate ticket scalping by allowing individuals who meet certain statutory requirements to resell tickets at above face value. States do this by either allowing sellers to register as brokers or by allowing sellers to solicit permission to sell at higher prices from the owners or operators of the event venues.<sup>25</sup>

A handful of states regulate ticket scalping by prohibiting the resale of tickets at above face value unless the reseller becomes properly registered.<sup>26</sup> Proper registration mandates that a broker meet certain requirements.<sup>27</sup> In Illinois, for example, to become registered, the broker must engage in the resale of tickets "on a regular and ongoing basis from one or more permanent fixed locations."<sup>28</sup> Further, the broker must implement several consumer protection requirements, such as maintaining a toll-free number for consumer complaints, adopting a refund policy, and establishing a \$100,000 "consumer protection rebate fund" in the form of "cash available for immediate disbursement for satisfaction of valid consumer complaints."<sup>29</sup>

Like Illinois, New Jersey and Alabama prohibit ticket brokers from engaging in the resale of tickets unless they meet a list of requirements.<sup>30</sup> In New Jersey, a ticket seller must have a permanent location to sell tickets, obtain proper registration, and maintain records of sales.<sup>31</sup> The seller must also make certain disclosures to buyers, such as the location of the seats, the seller's guarantee policy, and the seller's refund policy.<sup>32</sup> In Alabama, any ticket holder may resell the ticket at above face value as long as the ticket holder pays a \$100 license tax.<sup>33</sup>

Illinois, New Jersey, and Alabama allow the resale of tickets at above face value by properly licensed or registered ticket brokers. Other states also allow the resale of tickets at above face value by only

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24. See *infra* notes 25–55 and accompanying text.

25. See *infra* notes 26–37 and accompanying text.

26. See ALA. CODE § 40-12-167 (2005); 720 ILL. COMP. STAT. 375/1.5 (2008); N.J. STAT. ANN. § 56:8-27 (West Supp. 2009); 4 PA. STAT. ANN. § 202 (West 2008).

27. See 720 ILL. COMP. STAT. 375/1.5(b)(1) (2008).

28. 375/1.5(b)(1)(A).

29. 375/1.5(b)(1)(F)(c-1)(iv).

30. See N.J. STAT. ANN. § 56:8-27 (West Supp. 2009).

31. See § 56:8-27(a)–(b), (d).

32. See § 56:8-27(e)–(g).

33. ALA. CODE § 40-12-167 (2003).

those sellers that obtain permission from the event's promoter or the venue's owner or operator. For example, North Carolina allows ticket agents to add a reasonable service fee to each ticket's face value. This fee cannot exceed \$3, unless the agent has obtained written permission from the promoter or operator of the venue to charge a service fee in excess of the statutory \$3 limit.<sup>34</sup> The statute's exception to the \$3 maximum appears to be very limited because its language demands that the written agreement between the agent and the promoter or operator be executed prior to the ticket's initial sale.<sup>35</sup>

California's statute also involves consent from the event promoter or venue operator. Under the statute, a seller needs written permission from the owner or operator of the property in which the event is to be held in order to resell the ticket at above face value while on that property.<sup>36</sup> This requirement applies only to a ticket that "was obtained for the purpose of resale."<sup>37</sup>

## 2. *Permitting Sales at Certain Distances from the Venue*

Some states restrict *where* tickets can be resold, as opposed to the statutes described above, which deal solely with *who* can resell tickets. For example, Arizona's statute prohibits the resale of a ticket for a price above face value if the sale occurs within 200 feet of the event's venue or in a conjoining parking structure.<sup>38</sup> Like California's statute, Arizona's statute applies only to tickets that are purchased for the purpose of resale.<sup>39</sup>

Similarly, New York's statute prohibits the resale of tickets within a certain distance from the venue,<sup>40</sup> but it is more far-reaching in two respects. First, its restriction is much more expansive: for venues that hold more than 5,000 people, tickets cannot be resold within 1,500 feet of the physical venue;<sup>41</sup> for venues of 5,000 people or less, the distance is reduced to 500 feet.<sup>42</sup> Additionally, New York's statute makes no

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34. N.C. GEN. STAT. § 14-344 (1995).

35. See *id.* The statute states that the initial ticket provider must inform the public of the agreed-upon service fee by printing or writing the amount of the fee on the tickets. *Id.*

36. See CAL. PENAL CODE § 346 (West 1999).

37. *Id.*

38. ARIZ. REV. STAT. ANN. § 13-3718 (2001).

39. *Id.*

40. N.Y. ARTS & CULT. AFF. LAW § 25.11 (McKinney Supp. 2009). This statute went into effect on July 18, 2007 and is in effect only until May 16, 2010.

41. *Id.*

42. *Id.*

mention of resale price. In theory and in practice,<sup>43</sup> the resale of tickets at prices below face value can be punishable under the statute.

### 3. *Limitations on Ticket Resale Price*

Another group of states prohibit the resale of tickets based on the price that the reseller charges. These states—including Kentucky, Maryland, and Wisconsin—allow the resale of tickets to occur as long as the resale price is not greater than the printed ticket price. These states make no exception for sellers who are properly registered or licensed, nor do they allow the ticket reseller to charge reasonable service fees in addition to the printed price.<sup>44</sup>

Similarly, Delaware does not allow ticket holders to “sell, resell or exchange any ticket” at a price above face value.<sup>45</sup> Delaware adds a unique wrinkle, however, by also governing *when* ticket scalping is prohibited. Under the statute, those sales, re-sales, and exchanges are prohibited if they occur the day of or the day before an event at one of the statute’s enumerated venues.<sup>46</sup>

Other statutes also regulate ticket scalping by controlling price, but they do so by allowing the seller to charge a certain amount above the ticket price. Arkansas’s statute strictly prohibits the resale of tickets at a price above face value.<sup>47</sup> But the statute does allow the seller to include a “reasonable charge for handling or credit card use” in addition to the printed price for tickets to a music event, although it is not allowed for athletic events.<sup>48</sup> North Carolina’s statute allows a seller to add a maximum of a \$3 service fee to the face value of each ticket,<sup>49</sup> while Florida’s statute allows a seller to charge no more than the face value plus \$1.<sup>50</sup>

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43. In 2007, a ticket holder was issued a summons in New York for trying to sell a ticket for \$20 below the ticket’s face value. Kate Hammer, *Police Are Cracking Down on Ticket Sales Outside Open*, N.Y. TIMES, Aug. 29, 2007, at D1, D3.

44. See KY. REV. STAT. ANN. § 518.070 (LexisNexis 2008); see also MD. CODE ANN., BUS. REG. § 4-318 (LexisNexis 2004); WIS. STAT. § 42.07 (2008).

45. DEL. CODE ANN. tit. 11, § 918(a) (2007). Delaware’s statute is explicitly applied only to events held at the sports and convocation center on the University of Delaware’s campus, to NASCAR races held at Dover Downs, or on any state or federal highway within the state. *Id.* This statute is not as narrow as it might seem because Delaware has no major professional sports teams.

46. *Id.*

47. See ARK. CODE ANN. § 5-63-201 (2005).

48. § 5-63-201(a)(1)(B).

49. N.C. GEN. STAT. § 14-344 (1995).

50. FLA. STAT. § 817.36 (2008)

#### 4. *Internet Sales*

Some states that restrict the online resale of tickets set up statutory exemptions for Internet sellers who meet certain requirements. For example, Illinois' statute allows the resale of tickets on a properly registered Internet auction listing service.<sup>51</sup> Similar to the requirements laid out for face-to-face ticket brokers, these Internet auction listing services must provide various consumer protection safeguards, including a refund policy and a dispute resolution procedure that gives resellers and buyers the ability to file complaints against each other.<sup>52</sup>

Pennsylvania structures its Internet sale exemption in a similar way.<sup>53</sup> It prohibits the resale of tickets at a price above the printed ticket price unless the seller has first obtained a license.<sup>54</sup> Similar to Illinois's statute, Pennsylvania's statute exempts Internet ticket sellers from the general prohibition of ticket resale as long as they meet similar consumer protection safeguards, including guaranteeing a refund for tickets that are counterfeit or do not match the ticket's description on the website.<sup>55</sup>

#### *B. Purposes of Anti-Ticket Scalping Legislation*

Ticket scalping legislation is driven by a variety of purposes and goals. At their core, the statutes seek to ensure fairness.<sup>56</sup> This fairness has a dual meaning because it applies both to consumers who are purchasing the tickets and to promoters who are initially selling the tickets.<sup>57</sup> This Section first examines the statutory purpose of consumer protection by controlling ticket prices and eliminating nuisance, fraud, and deceit.<sup>58</sup> This Section then explains the statutory purpose of protecting the promoter by safeguarding the promoter's goodwill and ensuring that others do not profit from the promoter's product at the expense of the promoter.<sup>59</sup>

##### *1. Protecting the Consumer*

Proponents of anti-ticket scalping legislation point to several consumer protections that are furthered by the legislation. One goal of

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51. See 720 ILL. COMP. STAT. 375/1.5(c) (2008).

52. See 1.5(c)(4)(B)–(c)(5).

53. 4 PA. STAT. ANN. § 202(c) (West 2008).

54. See § 202(a).

55. See § 202(c).

56. See Yang, *supra* note 4, at 120–21.

57. See Criscuolo, *supra* note 5, at 196–99.

58. See *infra* notes 60–67 and accompanying text.

59. See *infra* notes 68–76 and accompanying text.



anti-ticket scalping statutes is to control the nuisance caused by those who resell tickets in the area around the venue.<sup>60</sup> The traditional ticket scalper resells tickets outside the venue, and therefore, proponents of the legislation argue that prohibiting the resale of tickets at the venue reduces “congestion, annoyance and inconvenience.”<sup>61</sup> The statutes controlling a scalper’s distance from the venue may reduce the nuisance caused by ticket scalpers, as may statutes that grant greater exemptions to Internet ticket sales.<sup>62</sup>

Further, ticket scalping statutes serve as a protection against fraud and deceit.<sup>63</sup> Proponents of the legislation argue that without the statutes, the ticket scalpers would sell counterfeit tickets or misrepresent the quality of the tickets.<sup>64</sup> Thus, statutes that allow ticket brokers to sell tickets if they meet certain consumer protection requirements are aimed at reducing the fraud and deceit that may accompany ticket scalping.

Anti-ticket scalping legislation also aims to serve consumers by keeping ticket prices down, thus providing a greater number of consumers with access to tickets. This assumes that ticket scalpers participate in the “gouging of ticket prices”<sup>65</sup> and that this is unfair because the ticket’s face price is its “fair” price.<sup>66</sup> According to one study, consumers would prefer that tickets be sold to those who waited in line the longest for the tickets, as opposed to those who were willing to pay the most for the tickets.<sup>67</sup> Statutes that prohibit the resale of tickets at prices above face value are aimed at achieving the goal of reducing ticket price and maximizing ticket availability.

## 2. *Protecting the Promoter*

In addition to protecting the consumer, scholars who support ticket scalping statutes point to the protection that they provide to promoters—those who originally sell the tickets.<sup>68</sup> When deciding on a ticket price, promoters may set the price at below market value as a demon-

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60. See Criscuolo, *supra* note 5, at 198–99; see also Robert E. Freeman & Daniel Gati, *Internet Ticket Scalping*, 21 ENT. & SPORTS L. 6, 6 (2003) (suggesting that ticket scalpers “create a negative atmosphere around the stadium”).

61. Criscuolo, *supra* note 5, at 198.

62. Cf., e.g., 720 ILL. COMP. STAT. 375/1.5(c) (2009); 4 PA. CONS. STAT. ANN. § 202 (2008).

63. See Sheree Rabe, Note, *Ticket Scalping: Free Market Mirage*, 19 AM. J. CRIM. L. 57, 62 (1991).

64. *Id.* at 59.

65. Criscuolo, *supra* note 5, at 199.

66. Yang, *supra* note 4, at 120.

67. *Id.* (citing Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1512 (1998)).

68. See Criscuolo, *supra* note 5, at 196–98.

stration of “goodwill.”<sup>69</sup> By doing this, the promoter is attempting to offer his product to “ordinary fans.”<sup>70</sup> When scalpers raise prices on resale, they are potentially ruining the promoters’ goodwill because tickets are now affordable to a smaller audience.<sup>71</sup> Although prices on the secondary market are controlled by scalpers, consumers might blame the promoters for the rise in tickets prices and refrain from purchasing future tickets.<sup>72</sup> Proponents of anti-ticket scalping legislation argue that promoters may lose out on even more profit through a reduction in sales of merchandise and other in-venue items such as concessions<sup>73</sup> because those consumers that purchase tickets priced at above face value might be less likely to spend money on in-venue items.<sup>74</sup> Therefore, statutes that control the price at which tickets may be resold are targeted at protecting promoters’ goodwill. Proponents of the legislation also claim that ticket scalpers harm promoters by making a profit that cannot be realized by the promoters themselves.<sup>75</sup> If there is a sudden jump in demand for a certain event, scalpers are able to increase ticket prices and make a larger profit than the profit made by the promoter. Proponents of anti-ticket scalping legislation argue that this type of behavior prevents promoters from “tak[ing] advantage of sudden rise in demand for such tickets . . . [t]hereby denying the promoters a full realization of the profit.”<sup>76</sup> Thus, proponents of anti-ticket scalping legislation believe that the legislation protects promoters.

### C. Challenges to Anti-Ticket Scalping Legislation

These purposes of anti-ticket scalping legislation can all fit under the umbrella of protecting public welfare. Courts have systematically upheld these purposes as valid justifications for the statutes in the face of due process challenges.<sup>77</sup> For example, courts in New Jersey,<sup>78</sup> Illi-

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69. *Id.* at 197–98.

70. *Id.* at 198.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 196.

76. *Id.*

77. Jonathan Bell, *Ticket Scalping: Same Old Problem With a Brand New Twist*, 18 LOY. CONSUMER L. REV. 435, 444–45 (2006). Bell states that since 1934 no challenge to anti-ticket scalping legislation has prevailed under a due process theory. *Id.* at 446. In 1934, the U.S. Supreme Court held in *Nebbia v. New York* that any economic policy will be upheld as long as it is “reasonably deemed to promote public welfare” and is not unreasonable, arbitrary, or capricious. 291 U.S. 502, 516 (1934). This shift toward a deferential approach to state legislatures essentially overruled a 1927 U.S. Supreme Court decision that struck down a New York statute that prohibited the resale of tickets for more than fifty cents over the face value. See *Tyson v. Banton*, 273

nois,<sup>79</sup> and Tennessee<sup>80</sup> have all heard and rejected claims that anti-ticket scalping statutes violate the Due Process Clause. Courts have also upheld anti-ticket scalping legislation against claims that it violates the Equal Protection Clause.<sup>81</sup>

### III. ANALYSIS

An analysis of the ticket market and the recent shifts in the market demonstrates that anti-ticket scalping statutes are not fulfilling their intended purposes. This Part begins by examining the overall effect, or lack thereof, that the statutes have had on the secondary ticket market.<sup>82</sup> It then discusses modern trends in the secondary ticket market—namely, the movement of primary ticket sellers into the mar-

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U.S. 418, 433 (1927). It also shifted the Court away from the jurisprudence of the *Lochner* era, which was characterized by a greater judicial willingness to strike down statutes that sought to regulate individual rights in the name of the public interest. See Bell, *supra*, at 444.

78. See N.J. Ass'n of Ticket Brokers v. Ticketron, 543 A.2d 997 (N.J. Super. Ct. App. Div. 1988). An association of ticket brokers challenged the constitutionality of a New Jersey anti-ticket scalping statute, citing *Tyson* to argue that the statute violated due process. *Id.* at 1001. The court upheld the statute as a reasonable attempt to promote public welfare. *Id.* at 999.

79. See *People v. Patton*, 309 N.E.2d 572 (Ill. 1974). A defendant who was charged with violating the Illinois Ticket Scalping Act challenged it on due process grounds. *Id.* at 573. The Illinois Supreme Court upheld the statute, citing *Nebbia* for the proposition that the statute was constitutional because it had a reasonable relationship to a legitimate government interest, and it was neither arbitrary nor discriminatory. *Id.* at 574–76.

80. See *State v. Spann*, 623 S.W.2d 272, 273 (Tenn. 1981). A defendant charged with violating Tennessee's anti-ticket scalping statute challenged it on due process grounds. *Id.* The Tennessee Supreme Court upheld the statute as a proper regulation of "health, safety, morals or welfare of the public." *Id.*

81. See, e.g., *State v. Leary*, 587 A.2d 85, 90 (Conn. 1991). A Connecticut statute allowed an event owner or operator to authorize any person to sell a ticket at a price above face value. *Id.* at 86. A defendant who was prosecuted under the statute challenged it on equal protection grounds, claiming that the statute granted a benefit to one group of individuals, while impermissibly denying it to another group of individuals. *Id.* at 87. The Connecticut Supreme Court upheld the statute because it bore a "reasonable relationship to a proper legislative purpose in a manner that is neither arbitrary nor discriminatory." *Id.* at 88. In upholding the statute, the court rejected the argument that the statute allowed for ticket scalping to occur and exorbitant prices to be charged in contravention of the statute's purpose to keep ticket prices down. *Id.* at 89. The court stated, "A more reasonable interpretation is that the legislature concluded that since an owner is free to enter into contractual relations regarding the price of tickets for his own pecuniary benefit, the exemption was appropriate, and that owners would not authorize others to sell tickets at an unreasonable markup." *Id.* The statutes challenged on equal protection grounds are those that carve out an exception to allow certain people, such as registered and licensed ticket brokers, to resell tickets. Another example is *State v. Youker*, in which the Oregon Court of Appeals rejected an equal protection claim made against a statute that forbade ticket scalping for events at public arenas, while allowing it for events at privately owned facilities. 585 P.2d 43, 44 (Or. Ct. App. 1978). The court found a rational basis for treating differently the two types of facilities: the public finances the public arenas and deserves an opportunity to purchase tickets at face value for events held there. *Id.* at 44.

82. See *infra* notes 85–98 and accompanying text.

ket and the rise in primary ticket prices—and analyzes how these trends undermine the purposes behind the anti-ticket scalping legislation.<sup>83</sup> This Part concludes by analyzing how market economics are frustrated by a secondary market that is heavily regulated by legislation.<sup>84</sup>

### A. *Are the Statutes Working?*

The secondary ticket market is a \$5 billion industry with a forecasted annual growth rate of 12%.<sup>85</sup> Ticketmaster, “the world’s leading ticket company,”<sup>86</sup> became involved in the secondary ticket market by purchasing TicketsNow, a ticket resale website, for \$265 million in early 2008.<sup>87</sup> Its purchase came one year after eBay purchased secondary market giant StubHub for \$310 million in 2007.<sup>88</sup> StubHub, the nation’s largest online ticket reseller,<sup>89</sup> enjoyed \$199 million in sales in 2006.<sup>90</sup> Thus, the secondary market is massive; the question is whether anti-ticket legislation effectively regulate this massive market.

The anti-ticket scalping statutes are having little effect on the face-to-face secondary ticket market.<sup>91</sup> Specifically, the statutes are difficult to enforce because they require added security measures to ensure that scalpers surrounding a stadium are caught.<sup>92</sup> Critics have suggested that security forces would need to be at least doubled in order to minimize ticket scalping that occurs outside venues prior to events.<sup>93</sup> Further, some scalpers are finding loopholes in the current

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83. See *infra* notes 101–171 and accompanying text.

84. See *infra* notes 175–193 and accompanying text.

85. Amy O’Brien, *Fans Frustrated by Resellers After AC/DC Sells Out in Four Minutes*, VANCOUVER SUN, Sept. 23, 2008, at A1.

86. Ticketmaster, *Who We Are*, <http://www.ticketmaster.ca/h/whoweare.html> (last visited Feb. 27, 2009).

87. Elise Young, *Congressional Hearings Set on Ticketmaster Merger; Examination Follows Outcry over Springsteen Sales*, BERGEN REC., Feb. 19, 2008, at A4.

88. O’Brien, *supra* note 85.

89. See Keith O’Brien, *Two Super Bowl Tickets, \$77,000: Fans Send Prices Soaring in High-Profile Matchup*, BOSTON GLOBE, Jan. 30, 2008, at A1, A12.

90. Drew Armstrong, *The Hottest Companies on This Year’s Inc. 500*, INC. MAG., Oct. 1, 2006, available at <http://www.inc.com/magazine/20061001/priority-inc500.html> (last visited Nov. 24, 2009).

91. See Jonathan C. Benitah, *Anti-Scalping Laws: Should They Be Forgotten?*, 6 TEX. REV. ENT. & SPORTS L. 55, 67–69 (2005). Benitah also argues that anti-ticket scalping statutes are unconstitutional. *Id.* at 61–67. He suggests alternative regulations that would confine scalpers to certain areas around the venue in order to reduce the nuisance. *Id.* at 77.

92. See Criscuolo, *supra* note 5, at 214–15.

93. *Id.* at 215.

anti-ticket scalping legislation by charging high fees in addition to the printed ticket price<sup>94</sup> or by packaging the ticket with other items.<sup>95</sup>

As lawmakers began to recognize that anti-ticket scalping statutes were not having their intended effect, they began adjusting or repealing their state's statutes. For example, Missouri does not allow any city, county, or political subdivision to enact an ordinance that would "prohibit the sale or resale of an admission ticket to any legal event at any price or prohibit the charging of any fee in connection with such sale or resale," although ticket scalpers can still be criminally punished for "fraud, false advertising, or other deceptive business practices."<sup>96</sup> As of 2007, forty-seven states either allowed ticket scalping in some manner or were in discussions about deregulating ticket scalping.<sup>97</sup> Among these are the states described above that allow the resale of tickets by registered brokers and those that allow resales a certain distance from the venue.<sup>98</sup>

### *B. Modern Trends in the Secondary and Primary Ticket Markets*

Two overarching trends exist in the ticket markets: the entrance of primary ticket sellers into the secondary ticket market,<sup>99</sup> and the increase in primary ticket prices.<sup>100</sup> This Section discusses these two trends.

#### *1. Primary Ticket Sellers Entering the Secondary Ticket Market*

Initially, primary ticket sellers were opposed to the resale of their tickets on the secondary Internet market.<sup>101</sup> But with a multi-billion dollar market sitting right in front of them, professional sports leagues and teams chose not to sit around idly while the secondary ticket market raked in money. Instead, the leagues and teams entered the sec-

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94. *Id.*

95. See Benitah, *supra* note 91, at 68.

96. MO. REV. STAT. § 67.306 (2007).

97. Heather Collura, *Move on to Deregulate Ticket Resale*, USA TODAY, July 5, 2007, at 12C. When Collura says that forty-seven states are deregulated or are considering becoming deregulated, it seems that her definition of "deregulated" includes statutory exceptions for Internet sales and registered ticket brokers, among others. See *id.* The shift, therefore, is not as pronounced as it might seem, because all of the state statutes previously discussed offer some way in which a party can legally resell a ticket.

98. See ALA. CODE § 40-12-167 (2003); ARIZ. REV. STAT. ANN. § 13-3718 (2001); 720 ILL. COMP. STAT. 375/1.5 (2005); N.J. STAT. ANN. § 56:8-27 (West 2001).

99. See *infra* notes 101-114 and accompanying text.

100. See *infra* notes 115-122 and accompanying text.

101. See *NPS LLC v. StubHub, Inc.*, No. 064874BLS1, 2007 WL 2367748, at \*1 (Mass. Super. Ct. July 31, 2007), in which the NFL's New England Patriots brought suit against StubHub for the unlicensed resale of tickets.

ondary ticket market in order to capitalize on the profits.<sup>102</sup> The National Football League (NFL) partnered with Ticketmaster prior to the 2008 season to create the NFL Ticket Exchange, a league-sponsored secondary ticket marketplace that complies with the applicable anti-ticket scalping laws.<sup>103</sup> The partnership aimed to capitalize on an already strong secondary ticket market—an estimated 1.1 to 2.2 million NFL tickets were sold on the secondary ticket market in 2007.<sup>104</sup> Fans are now able to set their own prices and sell tickets to all NFL games.

Professional sports teams are also forming ticket exchange websites to capitalize on Internet ticket sales. TicketMaster, which operates the NFL's Ticket Exchange, operates similar exchanges for eight NFL teams, twenty National Hockey League (NHL) teams, and twenty National Basketball Association (NBA) teams.<sup>105</sup> Teams have also attempted to capitalize on secondary ticket sales by forming sponsorship agreements with various secondary ticket websites.<sup>106</sup> Under this practice, a team receives a flat fee from the ticket reseller, and the ticket reseller is granted some type of exclusive access to that team's secondary ticket market.<sup>107</sup> For example, the NFL's Chicago Bears have an agreement with StubHub, under which StubHub pays the Bears a flat fee in exchange for receiving "exclusive access" to the Bears' website and permission to use the Bears' logo.<sup>108</sup> Other teams provide advertising space to ticket resellers in exchange for a fee.<sup>109</sup>

Primary ticket sellers also profit on the secondary ticket market through "percentage fee agreement(s)"<sup>110</sup> instead of flat-fee arrangements. StubHub makes a profit by forcing buyers to pay a 10% fee and charging sellers a 15% commission on sales.<sup>111</sup> MLB formed an agreement with StubHub in 2007, authorizing StubHub as its exclusive

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102. See Dreyer & Schwartz, *supra* note 14, at 780.

103. See McCarthy, *supra* note 14.

104. *Id.*

105. See Ticketmaster, Browse by Team, [http://teamexchange.ticketmaster.com/html/tmt\\_home.html?l=EN](http://teamexchange.ticketmaster.com/html/tmt_home.html?l=EN) (last visited on Nov. 16, 2009) (listing the teams that participate in the Ticket Exchange).

106. Dreyer & Schwartz, *supra* note 14, at 780–86.

107. *Id.* at 781.

108. *Id.*

109. See *id.* at 782. The NFL's Jacksonville Jaguars have a deal with TicketsNow, a ticket resale website, that provides the site with access to radio, television, and in-stadium advertising. *Id.*

110. *Id.* at 782–83.

111. Rachel Konrad, *StubHub, MLB Enter Ticket Resale Pact*, USA TODAY, Aug. 2, 2007, [http://www.usatoday.com/money/economy/2007-08-02-2406372049\\_x.htm](http://www.usatoday.com/money/economy/2007-08-02-2406372049_x.htm).

ticket reseller.<sup>112</sup> As part of the deal, StubHub shares with MLB 25% of the profit that is gained from ticket resales.<sup>113</sup>

In sum, the migration of primary ticket sellers into the secondary market has opened up new avenues to resell tickets, contributing to a secondary market that produces between \$4 and \$10 billion in overall sales.<sup>114</sup>

## 2. *Rise in Primary Ticket Prices*

In addition to getting involved in the secondary ticket market, primary ticket sellers are also raising prices in the primary ticket market. In essence, the secondary ticket market has allowed promoters to realize the high demand for their tickets, and, in turn, raise ticket prices. Some promoters accomplish this by enacting an across-the-board price hike in response to higher resale prices on tickets for previous events.<sup>115</sup> Other promoters will vary their prices based on the expected demand for various events. For example, the NBA's Utah Jazz implemented such a "variable pricing" policy prior to the 2008–2009 season.<sup>116</sup> Under this policy, the team studied its secondary ticket exchange website to determine what games were most popular among ticket buyers, and it then raised face values for ten of the team's forty-one home games.<sup>117</sup> The NFL's New York Jets have also increased prices by taking advantage of the Internet's secondary ticket market. In anticipation of the opening of its new stadium in 2010, the Jets used Stubhub to auction off 620 top-tier seat licenses in the stadium.<sup>118</sup> A seat license gives the holder the right to buy tickets.<sup>119</sup> The bidding enabled the team to take advantage of the online market and allowed it to determine the true market value of tickets.<sup>120</sup> On average, pri-

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112. *Id.*

113. *Id.*

114. Keith Reed, *Patriots Sue Ticket Reseller in Effort to Fight Scalping*, BOSTON GLOBE, Nov. 23, 2006, at A1, A28.

115. See Virginia Rohan & Eunnie Park, *A Ticket to Scalp; How Sellers Use Internet to Drive Up Prices*, BERGEN RECORD, Dec. 30, 2007, at A1.

116. Michael C. Lewis, *NBA & Jazz: Expect Higher Ticket Prices for Higher Profile Games*, SALT LAKE TRIB., Oct. 28, 2008.

117. *Id.* In addition to using its secondary ticket exchange website to pick specific games for which to raise prices, the team also relied on the secondary ticket market when making its overall decision to raise primary prices. *Id.* The team's senior vice president of sales and marketing said, "There is a secondary ticket market out there, where people are paying increased prices for specific games. We felt that we could capitalize on this opportunity and capitalize on the demand for these tickets, and generate some additional revenue." *Id.*

118. *Jets Cheer Online Sale of Seat Licenses; Bidders Ante Up \$16 Million Just for the Rights to Buy Tickets*, TORONTO STAR, Oct. 29, 2008, at S6.

119. *Id.*

120. *Id.*

mary ticket prices have been rising in all four major sports leagues in the United States,<sup>121</sup> as exemplified by the conduct of the Utah Jazz and the New York Jets. The increase in professional sports ticket prices is highlighted by the 2009 Super Bowl: for the first time in history, the face value for a Super Bowl ticket was \$1,000.<sup>122</sup>

### C. *Effects of the Modern Trends on the Statutes' Purposes*

These trends—primary ticket sellers entering the market via secondary ticket exchanges and the rise of primary ticket prices—weaken the purposes behind anti-ticket scalping legislation in two ways. First, they devalue the protections the statutes give to the consumer, namely, lower ticket prices and the minimization of fraud and nuisance.<sup>123</sup> Second, they undercut the protections that the statutes give to the promoter, namely, protecting his goodwill and profits.<sup>124</sup>

#### 1. *Protecting the Consumer*

Current trends in the sale and resale of tickets are undermining the protections meant for consumers because the statutes do not lower ticket prices or reduce nuisance and fraud. One justification of anti-ticket scalping legislation is that it keeps ticket prices down for consumers.<sup>125</sup> As demand for an event rises, tickets are scalped at “excessive market prices.”<sup>126</sup> In an open market, “[a] disproportionate number of tickets for each event . . . are purchased by professional scalpers with the sole intention of making a profit from the resale of tickets.”<sup>127</sup> Legislation aimed at keeping ticket prices down should indeed keep prices down. But by analyzing primary ticket prices, it is easy to see that this has not been the case—there exists a clear trend of primary ticket sellers elevating face values for tickets.<sup>128</sup> However,

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121. Nancy Armour, *Fans Getting a Break As Economy Sours*, PRESS REG., Oct. 26, 2008, at 2C. For the past decade, prices have risen in all four leagues. As of 2008, the average National Football League ticket price was \$72.20, the average National Basketball Association ticket price was \$48.83, the average National Hockey League ticket price was \$49.66, and the average Major League Baseball ticket price was \$25.43. *Id.*

122. Ira Kaufman, *That Super Bowl Seat May Cost You \$1,000*, TAMPA TRIB., Oct. 16, 2008, at 1.

123. See *infra* notes 125–161 and accompanying text.

124. See *infra* notes 162–171 and accompanying text.

125. See Criscuolo, *supra* note 5, at 198–200. The legislative purpose of keeping ticket prices down can also be inferred from the state statutes of Delaware, Kentucky, Maryland, and Wisconsin. These states prohibit ticket scalping if the ticket is sold at a price above its face value. See DEL. CODE ANN. tit. 11, § 918(a) (2007); KY. REV. STAT. ANN. § 518.070 (West 2008); MD. CODE ANN. BUS. REG. § 4-318 (LexisNexis 2004); WIS. STAT. § 42.07 (1993).

126. Criscuolo, *supra* note 5, at 196; accord Rabe, *supra* note 63, at 60.

127. Criscuolo, *supra* note 5, at 192.

128. See Armour, *supra* note 121; Lewis, *supra* note 116.



a direct increase in primary ticket prices is not the most telling factor to analyze whether the statutes are achieving their goals. This is the case because a price increase could be unrelated to ticket scalping and not reflective of the legislation's effectiveness.<sup>129</sup>

A more relevant factor is the entry of sports teams,<sup>130</sup> third party facilitators,<sup>131</sup> and ticket brokers<sup>132</sup> into the secondary ticket market. Sports teams have entered the secondary market by setting up their own secondary ticket websites<sup>133</sup> and by partnering with existing secondary ticket websites.<sup>134</sup> These websites are one avenue for independent sellers to enter the secondary ticket market. Another avenue is through third-party facilitator sites such as Stubhub. Many of the professional sports teams' websites operate in this way, providing ticket holders and ticket seekers with an online marketplace where sellers and buyers converge.<sup>135</sup> Ticket brokers have also emerged as a viable option for those who seek tickets. An estimated 800–1,000 ticket brokers exist in the United States, and brokers sell an estimated 10% to 30% of primary tickets.<sup>136</sup>

These resale options, established by primary ticket sellers, create a secondary market that is full of opportunities for consumers to buy and sell tickets. These developments have an impact on ticket prices. In addition to a rise in primary ticket prices, the prominence of the secondary ticket market has also undermined anti-ticket scalping legislation's purpose of keeping prices down.

First, these providers of secondary ticket opportunities theoretically have no price ceiling. StubHub and Ticket Exchange, the websites used by many professional sports teams,<sup>137</sup> allow the seller to set the

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129. Even though a price hike that is imposed by primary ticket sellers runs contrary to the statutory goal of keeping prices down, a price hike could be unrelated to ticket scalping. Whether ticket scalping statutes are strict, lax, or nonexistent, a primary ticket seller may raise prices in order to keep up with higher costs due to inflation or raise more revenue that will fund a venue expansion or an increased team payroll, among other reasons.

130. See Dreyer & Schwartz, *supra* note 14, at 780–87; see McCarthy, *supra* note 14, at 12C.

131. See Stephen K. Happel & Marianne M. Jennings, *Creating a Futures Market for Major Event Tickets: Problems and Prospects*, 21 CATO J. 443, 450 (2008) ("Buyers in the secondary market are not going to brokers online. Instead they are headed to auction sites.").

132. See *id.* at 449–50.

133. See TicketMaster, *supra* note 105 and corresponding text.

134. See Dreyer & Schwartz, *supra* note 14, at 780–82.

135. See Ticketmaster, About TicketExchange, <http://www.ticketmaster.com/h/te/about.html> #Q1 (last visited Feb. 27, 2009); StubHub, Welcome to StubHub, <http://www.stubhub.com/about-us> (last visited Feb. 27, 2009) ("[E]nabling fans to buy and sell tickets to tens and thousands of sports, concert, theater and other live entertainment events.").

136. See Happel & Jennings, *supra* note 131, at 449. The 10% to 30% estimate is based on two different estimates. The first estimate put the total amount of primary tickets sold by ticket brokers at 10%, while the other estimate assumed it was closer to 20% to 30%. *Id.*

137. Ticketmaster, *supra* note 105.

price of the tickets.<sup>138</sup> Additionally, nothing is preventing ticket brokers from setting similarly high prices. The only limitation on price is what the market will bear. It is unlikely that a rational ticket broker or independent seller will post a price that it feels is well above what the market will pay. But statistics show that even with market demand providing some form of a price ceiling on the resale of tickets, prices in the secondary market are substantially higher than face value. In the middle of the 2008 season, the average ticket price on Stubhub for twenty-two of thirty Major League Baseball teams was at least double the average face value of tickets for those teams.<sup>139</sup> Of the remaining eight teams, all eight had an average ticket price on StubHub that was at least \$10 greater than the ticket's average face value.<sup>140</sup>

Further, various anti-ticket scalping statutes are either not focused on imposing or are unable to impose maximum price limitations. For example, both Illinois and New Jersey have statutes that allow ticket brokers to become properly registered,<sup>141</sup> and neither statute mentions any price limitations on the brokers.<sup>142</sup> Even the states that prohibit the resale of tickets at specific prices might struggle to effectively control resale price because of enforcement issues related to face-to-face<sup>143</sup> and Internet sales.<sup>144</sup> To control face-to-face scalping, a state would need to take security measures, which necessarily entails higher costs. As one commentator noted,

Most states lack the money necessary to adequately police and prosecute scalping offenders . . . Security forces, in order to minimize ticket scalping, must be more than doubled on the nights of performances. Therefore, to significantly reduce scalping problems, a

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138. StubHub's method for sellers is, "List your tickets for sale. You set the price." StubHub, <http://www.stubhub.com/how-stubhub-works/> (last visited Feb. 27, 2009). TicketExchange's policy is similar, telling a seller to enter "the posting price you designate." Ticketmaster, TicketExchange, <http://www.ticketmaster.com/ticketexchange/selling/> (last visited Feb. 27, 2009).

139. See *Average MLB Ticket Sale Prices on StubHub down 2.9%*, SPORTS BUS. DAILY, July 10, 2008, <http://www.sportsbusinessdaily.com/article/122251> (listing the 2008 average ticket price on Stubhub.com for each Major League Baseball team through July 10, 2008); see also *Major League Baseball Average Ticket Prices*, BOSTON, Mar. 28, 2008, [http://www.boston.com/sports/baseball/articles/2008/03/28/average\\_ticket\\_price\\_list/](http://www.boston.com/sports/baseball/articles/2008/03/28/average_ticket_price_list/) (listing the 2008 average face value ticket price for each Major League Baseball team).

140. See *Average MLB Ticket Sale Prices on StubHub down 2.9%*, *supra* note 139; see also *Major League Baseball Average Ticket Prices*, *supra* note 139.

141. 720 ILL. COMP. STAT. 375/1.5 (2005); N.J. STAT. ANN. § 56:8-27 (West 2001).

142. See 720 ILL. COMP. STAT. 375/1.5; N.J. STAT. ANN. § 56:8-27.

143. See Criscuolo, *supra* note 5, at 214–15.

144. See Daniel J. Glantz, Note, *For-Bid Scalping Online? Anti-Ticket Scalping Legislation in an Internet Society*, 23 CARDOZO ARTS & ENT. L.J. 261, 286–87 (2005).

greater number of security would be required, thus creating a burden most state's [sic] simply cannot afford.<sup>145</sup>

Enforcing anti-ticket scalping statutes on Internet sellers is also difficult.<sup>146</sup> One problem is jurisdiction: a seller can live in one state, a consumer can live in another state, and the event can take place in a third state.<sup>147</sup> A second problem is that Internet sales involve anonymous buyers and sellers. These two problems make enforcement costly relative to the fine imposed by prosecution.<sup>148</sup> A third problem related to the regulation of Internet ticket sales is the heavy involvement of primary ticket sellers in the secondary Internet market. This involvement means that many sports teams and venue operators will simultaneously be looking for protection from face-to-face scalping outside their venues while also promoting Internet resales between its ticket holders and secondary market consumers.<sup>149</sup> The hope held by primary ticket sellers—that scalping be eliminated in some places and not others—means that “anti-ticket scalping legislation must now overcome a presumption that selective enforcement of the law has occurred.”<sup>150</sup> Thus, anti-ticket scalping statutes do little to protect consumers and control ticket price.<sup>151</sup>

Another consumer protection policy associated with anti-ticket scalping legislation is the reduction or elimination of “congestion, annoyance and inconvenience in areas where crowds must move rapidly

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145. Criscuolo, *supra* note 5, at 214–15. Criscuolo discusses and dismisses private enforcement as a possible remedy for insufficient government enforcement of anti-ticket scalping legislation. *Id.* at 218. Under the proposed remedy, consumers who purchase tickets from the scalper can sue to receive the difference between the scalped price and the face value of the ticket, plus some punitive damages. *Id.*

146. See Glantz, *supra* note 144, at 286–87.

147. *Id.*

148. *Id.* at 287.

149. See *id.*

150. *Id.*

151. While anti-ticket scalping legislation might struggle to control ticket price, it does not necessarily mean that ticket prices are “out of control.” A quick search of any third-party facilitator or Internet ticket broker would probably bring up reasonable—and even below face value—ticket prices. During the 2008–2009 season, the lowest face value ticket price for a Chicago Bulls home game was \$10. Bulls.com, Ticket & Arena Info, <http://www.nba.com/bulls/tickets/index.html> (last visited Feb. 26, 2009). The lowest ticket price on StubHub for each remaining home game in the Bulls 2008–2009 season ranged from \$5 to \$30. StubHub, Chicago Bulls Tickets, <http://www.stubhub.com/chicago-bulls-tickets/> (last visited Feb. 26, 2009). Reasonable and below value secondary market prices are not constrained to the NBA: the NHL's Chicago Blackhawks offered a \$15 ticket as its cheapest individual home game price. Chicago Blackhawks, Tickets, <http://blackhawks.nhl.com/tickets/seatingandpricing.htm> (last visited Feb. 26, 2009). On StubHub, the cheapest price for the team's remaining home games ranged from \$8 to \$18. StubHub, Chicago Blackhawks Tickets, <http://www.stubhub.com/chicago-blackhawks-tickets/> (last visited Feb. 27, 2009).

and safely.”<sup>152</sup> Collectively, this can be considered an attempt at eliminating the nuisance caused by ticket scalping. Assuming that scalping is truly a nuisance,<sup>153</sup> one must analyze whether the nuisance created by ticket scalpers has been reduced or eliminated, and if so, whether the statutes are the cause. While it is difficult to measure face-to-face ticket scalping before and after the inception of anti-ticket scalping legislation, analyzing other avenues for ticket scalping can shed some light on the amount of ticket scalping that occurs outside a venue. As previously discussed, ticket scalping by way of the Internet is growing, both through team-supported websites and third-party auction sites. For example, from its inception in 2000 to 2006, StubHub sold approximately five million tickets.<sup>154</sup> The company reached ten million tickets sold less than one year later.<sup>155</sup> And just seven months after that, the company had sold a total of fifteen million tickets.<sup>156</sup> Stubhub’s Internet growth seems to be the rule, not the exception, for primary ticket sellers. Ticketmaster, a leading primary ticket seller, has seen its sales shift away from walk-up and face-to-face sales and toward the Internet. In 1996, the number of Ticketmaster tickets sold online in relation to “traditional retail and telesales channels” was .1%.<sup>157</sup> By the second quarter of 2000, that number had risen to 24.8%.<sup>158</sup> This evidence shows that the world’s largest primary<sup>159</sup> and secondary ticket sellers<sup>160</sup> are seeing their Internet sales skyrocket.

So what does this mean? Tickets to events are limited. An increase in ticket sales through one avenue implies a decrease in ticket sales through another. With an increase in online sales—both in the primary and secondary market—it is reasonable to assume that fewer primary tickets are being purchased at the venues, and that fewer tickets are being scalped outside the venues. This theory is supported by other commentators: “Instead of the stereotypical ticket scalper hold-

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152. See Criscuolo, *supra* note 5, at 198.

153. This Comment argues that while everyone who has attended a professional sports event would acknowledge the presence of scalpers surrounding the venue, not everyone would consider their presence to be especially annoying, inconvenient, or the cause of congestion. But courts have held that any statutory purpose that is reasonably related to public welfare is appropriate, and courts have consistently upheld anti-ticket scalping statutes. See Bell, *supra* note 77, at 444–46.

154. Press Release, Stubhub, StubHub’s 15 Millionth Ticket Is Sold! (Aug. 1, 2008), available at <http://www.reuters.com/article/pressRelease/idUS130668+01-Aug-2008+MW20080801>.

155. See *id.*

156. *Id.*

157. Happel & Jennings, *supra* note 136, at 450.

158. *Id.*

159. Tickets News, Top Primary Ticket Sellers, <http://www.ticketnews.com/view/TopPrimarySellers> (last visited Feb. 26, 2009).

160. *Id.*

ing an abundance of tickets above his or her head risking arrest in order to make a profit, most ticket scalping occurs behind the scenes, on Internet auction sites or through registered ticket brokers.”<sup>161</sup> While the nuisance has been reduced, the cause behind the reduction does not support the continued use of anti-ticket scalping statutes. In sum, the reasons for the decrease in the nuisance associated with face-to-face ticket scalping can reasonably be attributed to the shift in where ticket scalping occurs, *not* in some overall decrease in ticket scalping caused by the legislation.

## 2. *Protecting the Promoter*

One of the goals of anti-ticket scalping legislation is to protect promoters, both by protecting their goodwill and by preventing others from unfairly appropriating the promoter’s profit.<sup>162</sup> But the increased involvement of professional sports teams and leagues in the secondary ticket market mitigates the need for these protections. By offering ticket holders an extra avenue to resell tickets, the promoters themselves are contributing to and participating in ticket scalping. Ticket scalping involves the resale of tickets at prices above face value to those who are willing to pay. The promoter is no longer an innocent bystander nor an unfortunate scapegoat for skyrocketing ticket prices. By participating in the resale of tickets, the promoters weaken their own argument—and the statute’s purpose—that they wish to keep ticket prices low for the protection of their goodwill.

In addition to protecting a promoter’s goodwill, anti-ticket scalping legislation is meant to ensure that only the promoter profits from ticket sales to the event.<sup>163</sup> Prior to the shift in the secondary ticket market, promoters were unable to take advantage of increased demand in the form of higher ticket sales.<sup>164</sup> Instead, scalpers were the ones benefiting from the higher demand.<sup>165</sup> But now that promoters are heavily involved in the secondary market, they are no longer handicapped when it comes to reaping the benefits of increased demand. The promoter can now receive a portion of the ticket resale price if it is sold above face value.<sup>166</sup>

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161. Bell, *supra* note 77, at 457.

162. Criscuolo, *supra* note 5, at 196–98.

163. *Id.* at 196.

164. *Id.* at 196.

165. *Id.*

166. Promoters receive a percentage of the ticket resale price in a variety of ways already discussed, including through resale agreements with Ticketmaster or percentage fee agreements with other websites. See Ticketmaster, *supra* note 105; see also Dreyer & Schwartz, *supra* note

Moreover, promoters are better off in an unregulated secondary ticket market when demand decreases for two reasons. First, an open online ticket market allows the promoter to profit twice: once in the primary market on the original ticket sale and again in the secondary market on the percentage fee it charges on the ticket resale. The promoter's resale profit even goes beyond that made by a traditional scalper, because unlike a traditional scalper, a promoter can profit even when demand decreases. Suppose an original ticket sells for \$50, but the downward shift in demand puts the secondary market price at \$40. Suppose further that the promoter charges a 10% fee on ticket exchange resales. A rational ticket holder wishing to sell his ticket will sell it at a loss, as opposed to "eating" the ticket and taking a complete loss. The promoter would receive \$50 on the original sale and \$4 on the resale (10% of resale), for a total of \$54. The scalper would receive \$36 (90% of the resale price) for a net loss of \$14. Here, entry into the secondary ticket market benefits the promoter in the form of an extra \$4.

Second, the structure of the online secondary market can help increase attendance at events with lower demand, compared to similar events where no secondary ticket market exists. Because promoters set ticket prices prior to the event, consumers who buy tickets ahead of time take a risk that the event may be turn out to be a disappointment.<sup>167</sup> Presumably, some consumers do not take this risk, choosing instead to wait and see if the event will be worthwhile. With ticket scalpers in place, tickets are scooped up and then resold. When demand decreases, consumers who declined to purchase primary tickets at face value may decide to buy at a reduced rate. When compared to the alternative of those consumers staying at home, the promoter is again benefited by scalpers.

Consider another simple example: suppose a promoter sells 100 tickets at a price of \$20 each for a football game that will be played in two months. If there is no secondary ticket market, 70 of those tickets might be sold immediately to fans who expect demand to stay the same, while 15 tickets will be purchased by fans who predict a demand increase and want to ensure a ticket before that occurs, and the remaining 15 tickets will go unsold because consumers are wary that the game will not be an attractive event in two months. Suppose that the game loses its appeal, and no more tickets are sold. The promoter has

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14, at 782–83 (discussing the percentage fee agreements that several teams have entered into with third parties).

167. Posting of Phil Miller to Market Power, [http://marketpower.typepad.com/market\\_power/2007/08/ticket-scalping.html](http://marketpower.typepad.com/market_power/2007/08/ticket-scalping.html) Aug. 1, 2007, 10:02 A.M.

sold 85 tickets and will have 85 consumers attend the game, for a total of \$1,700 in addition to in-venue purchases.<sup>168</sup> Now suppose the same scenario occurs in a world with a strong secondary ticket market. Presumably, there will be a slight drop in the number of fans who immediately buy tickets.<sup>169</sup> So instead of an initial sale of 70 tickets, only 65 tickets are sold to fans who expect demand to stay constant. The same 15 tickets will be purchased by consumers who want to ensure a ticket before demand increases. Ticket brokers and other scalpers snatch up 15 of the remaining 20 tickets, taking the risk that demand might decrease while hoping that they will profit if demand increases. The promoter has sold 95 tickets, for a total of \$1,900. Suppose again that demand decreases. The 5 unsold tickets remain unsold, but the brokers and scalpers are able to sell 10 of their 15 tickets at a price below face value. As a result, 90 consumers attend the game—80 primary consumers and the 10 consumers that purchased tickets from brokers or scalpers.<sup>170</sup> In comparing the two scenarios in which demand decreases—one in a world with no secondary market and one in a world with such a market—a promoter sold more tickets and had more consumers attend the event in a world in which ticket scalping is allowed.

The preceding example presumed that when a secondary ticket market exists, rational consumers might purchase fewer primary tickets because they would be aware that they can acquire tickets at a later date in the secondary ticket market. But this is not necessarily true; perhaps an expanded secondary ticket market could generate greater primary ticket sales. As the secondary ticket market grows, so does the opportunity for a ticket holder to resell his ticket. With this opportunity could come a greater likelihood that consumers will purchase tickets from the promoter because they are ensured of recouping some or all the original ticket price if they cannot attend the event, or if they lose interest.<sup>171</sup> In sum, the availability of a secondary ticket market might reduce primary ticket sales, but conversely, its availability could be a primary reason that consumers purchase more tickets from primary sellers.

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168. This presumes that every person who purchased a ticket will attend the event even after demand decreases. This is probably not the case, in reality, but it will be presumed for the purpose of the example.

169. A rational fan might want to delay purchasing a ticket for reasons other than to see what happens to demand. Perhaps the fan is worried about a conflict between the ticketed event and another event, or would rather put the money toward another purchase at that time. The opportunity to purchase a ticket later in the secondary market allows a fan to delay purchase for these reasons.

170. Once again, this presumes that every purchaser of a ticket will attend the event.

171. See Joe Nocera, *Internet Puts a Sugarcoat on Scalping*, N.Y. TIMES, Jan. 19, 2008, at C1, C8.

*D. Effect of Economics on Statutory Purposes*

The modern trends in ticket sales and ticket scalping are not the only factors that undercut the purposes driving anti-ticket scalping legislation. Market economics does so as well. This Section first examines ticket prices under a simple supply and demand analysis, and then turns its focus to the demand-based risks that promoters take.<sup>172</sup> This Section then analyzes barriers to entry created by some of the anti-ticket scalping statutes.<sup>173</sup> Finally, this Section contemplates how a free market can and actually does foster at least one goal meant to be achieved by ticket regulation, namely, lower prices.<sup>174</sup>

*1. Market Economics*

Opponents of anti-ticket scalping legislation argue that the legislation “interferes with the supply and demand of the free market.”<sup>175</sup> An increased demand coupled with a fixed supply should generally lead to increased prices. Since it is impossible for ticket supply to increase endlessly in order to match an increase in demand, ticket prices should rise when demand rises. But some anti-ticket scalping statutes do not allow price increases when demand increases. This artificially regulates ticket prices and usurps the price setting mechanism that free-market economics naturally has in place. This mechanism “ensures that those consumers who want a scarce commodity most will receive it.”<sup>176</sup> The price mechanism theory explains how prices are set in the secondary market for most products, but it is overridden in the secondary market for ticket sales because of concerns for consumer and promoter welfare. As one scholar noted,

There are countless products that are perfectly legal to resell at top market value such as art, antiques, and sports collectibles. None of these items have any prohibition on their resale, even though a “true fan” of Pablo Picasso or Babe Ruth will never be able to acquire anything with their signature on it.<sup>177</sup>

Anti-ticket scalping statutes are aimed at protecting promoters’ goodwill<sup>178</sup> and denying scalpers the ability to profit from the highly

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172. See *infra* notes 175–183 and accompanying text.

173. See *infra* notes 184–191 and accompanying text.

174. See *infra* notes 192–193 and accompanying text.

175. Rabe, *supra* note 63, at 63.

176. WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 297 (11th ed. 2009).

177. Benitah, *supra* note 91, at 69–70.

178. Criscuolo, *supra* note 5, at 197–98. A promoter might set a lower price than the market would allow because he wants consumers to spend more money once inside the venue. *Id.* The promoter might also set a lower ticket price in order to make tickets available to the largest



demand seats.<sup>179</sup> But it is the promoters' own policy of setting ticket prices in advance that prevents them from being able to profit from an increase in demand.<sup>180</sup> A promoter has several reasons to set prices in advance of events. For example, long lines may develop if a promoter made tickets available only immediately prior to the event.<sup>181</sup> The early sale of tickets can also protect a promoter from reduced sales that occur when consumers lose interest in the event.<sup>182</sup> If the event is a sports game, fans will lose interest if the teams are performing poorly. If the event is an entertainment act, there is a risk that the audience will lose interest because, as one commentator put it, "performers go quickly from being 'in' to being 'out.'"<sup>183</sup> Selling tickets before the event date allows promoters to protect themselves from a potential decrease in demand. Thus, promoters are unable to profit from a sudden rise in demand because they chose to protect themselves from a sudden decrease in demand. But one of the purposes driving anti-ticket scalping legislation is to protect promoters by preventing others from appropriating the promoter's profits when demand increases. Therefore, the statutes provide too much protection for promoters because it is the promoters' own policies protecting against demand decrease that give scalpers the ability to resell tickets for profit.

## 2. *Barriers to Entry*

Anti-ticket scalping legislation in several states may also be creating statutorily imposed barriers to entry in the ticket brokerage market. Some states that permit the resale of tickets have enacted statutes with requirements to become a licensed ticket broker;<sup>184</sup> some of the requirements create reasonably low barriers to entry into the secondary ticket market. New Jersey, for example, requires that a ticket broker have a permanent location to sell tickets, obtain a proper registration, maintain records of sales, and disclose to the buyer the location of the seats, the seller's guarantee policy, and the seller's refund

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number of people as possible. Scalping "deprives individuals, unable to afford the scalpers' premiums, from attending the event." *Id.* at 192.

179. *Id.* at 196.

180. *Id.*

181. See Stephen K. Happel & Marianne M. Jennings, *The Folly of Anti-Scalping Laws*, 15 CATO J. 65, 75 (1995). Happel and Jennings cite Bruce Springsteen's attempt to ensure that only true fans attended his concert by selling tickets only at the show and then requiring purchasers to immediately enter the arena. *Id.*

182. *Cf. id.* at 70 (discussing the market restraints that are imposed on ticket pricing).

183. *Id.*

184. See, e.g., 720 ILL. COMP. STAT. 375/1.5 (2008); N.J. STAT. ANN. § 56:8-27 (West 2001 & Supp. 2009).

policy.<sup>185</sup> But other states have constructed relatively high barriers. Illinois, for example, requires that a ticket broker have \$100,000 available for consumer protection claims.<sup>186</sup> In a competitive market, barriers to entry hinder the ability of new competitors to enter and compete in the market.<sup>187</sup>

Barriers to entry alone do not necessarily create a market problem because “many markets have at least some impediments that make it more difficult for a firm to enter the market.”<sup>188</sup> But when entry barriers become substantial enough, they “can retard, diminish, or entirely prevent the market’s usual mechanism for checking market power: the attraction and arrival of new competitors.”<sup>189</sup> This Comment proposes that a \$100,000 entry fee represents more than a natural barrier created by the market. Instead, it is a significant hurdle that will effectively keep many potential sellers out of the secondary ticket market. This reduction in firms and parties who participate in the resale of tickets reduces the level of competition that incumbents face in the secondary ticket market.<sup>190</sup> Without this competition, prices will tend to increase because a reduction in competition generally leads to increased prices. If more firms could easily enter the secondary ticket market, greater competition would lead to lower prices.<sup>191</sup> Thus, it seems that statutorily imposed barriers to entry could potentially create higher prices for consumers in the secondary ticket market than if the market was simply unregulated. Plainly, anti-ticket scalping statutes are not furthering their goal of maintaining lower prices, and in fact, seem to be having the opposite effect.

### 3. *Benefits of an Open Market on Ticket Prices*

When demand decreases, an unregulated secondary ticket market would more effectively foster the intended goals of the regulation. Just as an open market could lead to prices above face value when demand increases, an open market could also lead to prices below face value when demand dips. But some anti-ticket scalping statutes prohibit the resale of tickets at below face value, and in fact, individu-

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185. See, e.g., N.J. STAT. ANN. § 56:8-27 (West 2001 & Supp. 2009).

186. 720 ILL. COMP. STAT. 375/1.5(b)(1)(F) (2008).

187. See Org. for Econ. Co-Operation and Dev., *Competition and Barriers to Entry*, POL’Y BRIEF, Jan. 16, 2007, <http://www.oecd.org> (search “Competition and Barriers to Entry” in the “Search Exact Match” field; then follow the first hyperlink returned by the search).

188. *Id.*

189. *Id.*

190. An entry barrier “has the effect of reducing or limiting competition.” *Id.*

191. See *id.*

als have been arrested for attempting to do so.<sup>192</sup> This undermines any goal of keeping ticket prices down. It can be argued that secondary ticket market prices that are below primary market prices are detrimental because they will divert sales from the promoter. Instead of purchasing tickets in the primary market, consumers will turn to the secondary market for virtually the same ticket at a lower price. This argument should be rejected because many of these statutes are in place to protect consumer welfare;<sup>193</sup> yet, paradoxically, many of these statutes prohibit the resale of tickets at below face value. This effectively prevents consumers from purchasing tickets at the lowest possible value, a result that ultimately harms consumer welfare.

#### IV. IMPACT

It is clear that modern trends in ticket scalping and market economics have undercut most, if not all, of the purposes behind regulating ticket scalping. This Part first describes and critiques the proposed federal legislation<sup>194</sup> that is aimed at fixing the deficiencies of state statutes and better regulating the trend of sellers who use the Internet to access the secondary ticket market.<sup>195</sup> This Part concludes by analyzing the effects of an unregulated secondary ticket market and proposing what can be done to address the problems that would exist in such a market.<sup>196</sup>

##### A. Proposed Federal Legislation

Federal anti-ticket scalping legislation was proposed for the first time in 1998 by U.S. Representative Gary Ackerman of New York.<sup>197</sup> The legislation did not pass,<sup>198</sup> but Daniel J. Glantz—an author who was supportive of federal anti-ticket scalping legislation—used Ackerman's plan to construct five provisions that any future federal legislation should contain.<sup>199</sup> First, the proposed legislation would contain a

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192. See Hammer, *supra* note 43, at D1, D3.

193. See Criscuolo, *supra* note 5, at 198; Rabe, *supra* note 63, at 61.

194. See *infra* notes 197–207 and accompanying text.

195. Glantz, *supra* note 144, at 298–99; see also Criscuolo, *supra* note 5, at 218 (citing a New Jersey case study that declares that the problem of ticket scalping is “a result of the absence of federal legislation in this area”).

196. See *infra* notes 225–231 and accompanying text.

197. Glantz, *supra* note 144, at 297–98. Ackerman is not alone in suggesting that greater legislation is the answer to the ticket scalping problem. See Criscuolo, *supra* note 5, at 218.

198. Glantz, *supra* note 144, at 298. The proposed Ticket Scalping Reduction Act of 1998 would have imposed fines or a maximum of two years imprisonment on those who scalp five or more tickets at one time, defining “scalp” as a markup of more than \$5 or 10% above face value. H.R. 3951, 105th Cong. (1998).

199. *Id.* at 299–304.

“licensing requirement” that would force sellers to be licensed and to pay annual fees and taxes.<sup>200</sup> Further, it would force sellers to include a licensing number with any tickets that they offer to sell, whether in a face-to-face or Internet transaction.<sup>201</sup> The second provision is a “record keeping requirement” that would force secondary market sellers to keep records of their sales in an effort to improve identification and reporting methods of ticket resales.<sup>202</sup> The third provision is really a group of “public interest provisions” that would limit the number of tickets that each licensee could resell in order to “open up the marketplace to more individuals, while making the price of tickets better reflect their natural ticket price level where supply meets demand.”<sup>203</sup> While limiting the total number of tickets one individual can resell, the “public interest provisions” would also increase the maximum price a seller can charge in the secondary ticket market.<sup>204</sup> Fourth, any proposed legislation, according to Glantz, should have a section of provisions set up to reduce nuisance. This includes a refund policy that allows ticket holders to sell back their tickets to the promoter for events that they cannot attend, and it would also contain a provision that designates a certain areas around the venue as scalping areas.<sup>205</sup> The fifth and final section of any proposed federal legislation would establish enforcement and authority regulations. This provision would grant “the SEC or a similar organization” the authority to supervise and enforce the ticket scalping restrictions, including the responsibility of employing security for venues in order to control face-to-face sales.<sup>206</sup> The cost of such enforcement would be covered by the registration fees and taxes that are required by the other sections of the proposed legislation.<sup>207</sup>

### B. *Is Federal Legislation the Answer?*

Glantz acknowledges that the secondary ticket market—as currently structured under the various state laws—favors venue operators

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200. *Id.* at 299–300.

201. *Id.* at 300.

202. *Id.* at 302. This provision makes exceptions for tickets sold at charity auctions and by non-profit organizations, for group sales, and for sales on websites when the tickets are reserved and then auctioned off to the high bidder. *Id.*

203. *Id.* at 301–02.

204. *Id.* at 301. Glantz does not explicitly identify what pre-existing “maximum price” he is referring to, but it can be inferred that he is referring to the maximum prices imposed by the already-existing state statutes that cap the price at which a ticket can be resold. *See id.* at 302 n.251.

205. *Id.* at 303.

206. *Id.*

207. *Id.* at 304.

and owners at the disadvantage of consumers.<sup>208</sup> His provisions do not aim to reduce or eliminate ticket scalping. Instead, their main goal is to create a “natural and fair secondary market” by maximizing the number of people who can participate in the secondary ticket market, which would ideally eliminate the advantage that promoters hold over consumers in the secondary market.<sup>209</sup> But in analyzing the five provisions, it is clear that all five are flawed.

### 1. *The Licensing Requirements and Record-Keeping Provisions*

The first two provisions—the licensing requirement and record-keeping requirement—are faulty for several reasons. First, the provisions would inhibit, rather than promote, a maximum amount of consumers from participating in the secondary ticket market. Common sense dictates that some ticket holders will simply not go to the trouble of recording ticket sales and becoming properly licensed, which includes paying fees, in order to resell their tickets. As a result, these consumers will remain precluded from the market, and the provisions would fail in its goal of eliminating the advantage that promoters hold over consumers in the secondary market.

It is undisputed that a legitimate risk of deceit exists in the resale of tickets, including the sale of counterfeit and misrepresented tickets. And at first glance, it seems that licensing and record-keeping provisions could counteract this risk. But the growth of the Internet as a medium for ticket resale has decreased this risk and mooted the need for such provisions. Leading resale websites StubHub and eBay contain consumer protection provisions that allow ticket purchasers to take action against sellers when they feel a sale has been fraudulent.<sup>210</sup> Other ticket websites have similar provisions.<sup>211</sup> The wide availability

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208. *Id.* at 305.

209. *Id.*

210. See StubHub, StubHub FanProtect Guarantee, <http://www.stubhub.com/guarantee/&?osid=home-about> (last visited Feb. 27, 2009). Stubhub's guarantee assures buyers that their tickets will be authentic and offers a refund for any delivered tickets that are not comparable to or better than the tickets that they ordered. The guarantee also promises to reimburse buyers for tickets to events that are rescheduled or canceled. *Id.* eBay's Resolution Center provides buyers with a handful of outlets to resolve issues, including directly contacting the seller, reporting the seller to eBay's Trust and Safety team, and contacting PayPal—the method of payment often used in eBay transactions. eBay, eBay Resolution Center, <http://www.resolutioncenter.ebay.com> (last visited Feb. 1, 2009).

211. See TicketsNow, TicketsNow 100% Unconditional Guarantee, <http://www.ticketsnow.com/Guarantee.html> (last visited Feb. 1, 2009) (promising a refund for tickets that are not authentic). TicketExchange, the online service used by many professional sports teams to resell tickets, offers buyers and sellers a customer service page through which they can lodge complaints. See Ticketmaster, Sports TicketExchange by Ticketmaster, [http://teamexchange.ticketmaster.com/html/tmt\\_home.html?l](http://teamexchange.ticketmaster.com/html/tmt_home.html?l) (last visited Feb. 1, 2008).

of consumer protections for online sales means that the bulk of the deceit concern rests with face-to-face sales. But deceit could potentially be an issue in only a small class of sales because of the shift in the secondary market away from face-to-face sales and toward Internet sales.<sup>212</sup> It is illogical to demand that all sellers in the secondary ticket market follow licensing and record keeping requirements—including some sellers who will presumably choose to stay out of the market rather than follow the requirements—in order to protect a small group of buyers in the secondary ticket market. Thus, both the burden imposed by these two provisions and their probable effect of reducing the number of sellers in the secondary ticket market outweighs the harm that the provisions purport to eliminate.

## 2. *The Quantity and Price Control Provision*

In an attempt to shift secondary ticket prices to a more “natural” spot where supply meets demand, the third provision places a ceiling on both the price and number of tickets that an individual can resell.<sup>213</sup> But both aspects of this provision would fail to achieve this “natural” supply and demand equilibrium. By capping the number of tickets that each individual can resell, the provision potentially puts an artificial limitation on supply—if someone has more tickets than he can legally resell, these tickets cannot enter the resale market. This reduction of supply is made more drastic when combined with the licensing and record-keeping provision, both of which would keep some potential resellers out of the secondary market. This would not lead to a “natural” price that reflects a perfect balance between supply and demand. Instead, it would lead to higher-than-natural prices for events with high demand because supply would equal demand only after ticket prices increase.<sup>214</sup> The end result would be an intense bidding war in which those who highly demand the tickets would compete for the scarcely available tickets. One complaint about the current secondary ticket market is that access to events is limited to only those consumers who are willing to pay high prices on the secon-

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212. See Criscuolo, *supra* note 5, at 198; Glantz, *supra* note 144, at 286–87.

213. Glantz, *supra* note 144, at 301–02.

214. See, e.g., Joseph Whelan & Kamil Msefer, Economic Supply and Demand, MIT Systems Dynamic in Education Project, Jan. 14, 1996, available at <http://sysdyn.clexchange.org/sdep/Roadmaps/RM6/D-4388.pdf>. The authors use the example of clothing to illustrate the point. When desired inventory (demand) exceeds inventory (supply), the price will rise. *Id.* at 9–11. Similarly, when desired tickets (demand) exceed available tickets (supply), the price will rise. The difference is that with clothing a seller can increase supply to match demand, thus bringing the price back down. The same cannot be done for tickets.

dary market, harming those consumers who cannot afford the tickets.<sup>215</sup> A quantity sold provision would only intensify this problem.

The maximum price prong of this provision is faulty for similar reasons. The aim of this provision is also to achieve some "natural ticket price level."<sup>216</sup> Generally, a natural price is one controlled by supply and demand, where a shift in supply or demand of a good leads to a price shift for that good.<sup>217</sup> When demand in a natural market elevates, price increases.<sup>218</sup> Capping secondary market prices will create an unnatural price whenever demand drives the price above the allowable price ceiling because that ceiling will make it impossible to sell the ticket at the price that reflects the increased demand. This problem is compounded when the price provision is analyzed in unison with the quantity provision. Just as increased demand allows a seller to raise price, so can a decrease in supply.<sup>219</sup> Therefore, a provision controlling the quantity of tickets available will create a market force that will raise prices, which is contrary to its complementary maximum price provision that sets a ceiling on the price of ticket resale. This contradiction created by the two parts of this third provision illustrates why the provision fails.

### 3. *The Sell-back Provision*

The sell-back provision attempts to cure some of the problems with the first provision by exempting ticket holders from the license requirement when they are selling their tickets back to the venue.<sup>220</sup> The problem with this provision is that it would require vendors to make sell-back an available outlet to tickets holders, as opposed to a buy-back option that vendors can invoke. Before analyzing the assortment of issues raised by this provision, it is necessary to fill in a key gap in this provision. It is assumed that the sell-back option operates as a "refund policy,"<sup>221</sup> such that it can be inferred that the buyback price is meant to be equal to the original purchase price. Operating under this assumption, a sell-back provision could be crippling to a promoter. Forcing venue operators to buy back tickets from consumers who are unable to attend an event would mean that they must

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215. See Criscuolo, *supra* note 5, at 198–99.

216. Glantz, *supra* note 144, at 302.

217. See Baumol & Blinder, *supra* note 176.

218. See Whelan & Msefer, *supra* note 214.

219. See *id.* The previous analysis that involved clothing illustrated that when demand exceeds supply, price will rise. In that scenario, an increase in demand caused demand to exceed supply. But a reduction in supply can have the same effect.

220. See Glantz, *supra* note 144, at 303.

221. *Id.*

return already-realized revenue and quickly find new consumers to purchase the tickets. Anti-ticket scalping statutes are in place, at least in part, to protect promoters.<sup>222</sup> Part of this protection includes preventing scalpers from profiting from the resale of tickets, even though the promoters profit from the initial sale. If ticket scalping is prohibited in order to prevent others from realizing small profits at the expense of promoters, then it is irrational for federal legislation to completely strip promoters of all profits on a ticket sale. Further, a refund policy would leave promoters with an allotment of tickets that they would need to resell. Promoters often sell tickets well in advance of an event to avoid the risk that a large amount of tickets will go unsold. Federal legislation that gives consumers the power to return tickets strips the promoters of this early-sale protection.

The sell-back provision is equally harmful to consumers. As the previous analysis notes, promoters would lack an incentive to sell tickets in advance of events if they were forced to offer ticket refunds. As a result, it is reasonable to think that some promoters may then sell tickets only immediately prior to events, creating a nuisance and burden on consumers who wish to attend the event. To ensure a ticket, consumers will line up well in advance of the event, maybe even days ahead of time if demand is great enough. Current anti-ticket scalping statutes, however, are aimed at protecting consumers from physical nuisances and disturbances.<sup>223</sup> The high probability that a sell-back policy could lead to nuisances for every popular event illustrates why the policy is unattractive.

In an unregulated market, promoters would be allowed to keep their profits and would not run the risk of being stuck with returned tickets; sellers would be able to seek “refunds”—albeit not always a full refund—from a wide pool of potential buyers; and potential disturbances caused by promoters delaying the sale of tickets are avoided.

#### *4. The Enforcement Provision*

Because the other provisions are unnecessary and counterproductive, a provision establishing enforcement authority and enacting strict penalties for violations is also unnecessary. It is also questionable whether licensing fees and taxes would be sufficient to fund a federal body that is capable of enforcing the legislation. Several states cur-

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222. See Criscuolo, *supra* note 5, at 196–98.

223. See *id.* at 198.



rently charge licensing and other fees,<sup>224</sup> but they have not been able to fully enforce their statutes. Even if enforcement was well-funded and organized, it would be difficult to track and prosecute many of the secondary market sales because they are sales that occur on the Internet and not between two people who are outside of a facility. Finally, the prevalence of primary ticket sellers in the secondary ticket market means that the enforcement organization would be faced with two options: selectively enforce the federal legislation by prosecuting individual resellers but not teams, or prosecute individuals resellers *and* those teams involved in the secondary ticket market. Both options would come with their problems, although those problems are not explored by this Comment.

*C. An Unregulated Market: Burden on the Promoter  
Instead of the Legislator*

The purposes and goals of the current anti-ticket scalping legislation are not being met and the statutes are thus both ineffective and unnecessary. Beyond acknowledging the kinks in the current legislation, it is also important to understand the benefits that an unregulated secondary ticket market can provide, both to the promoters and consumers. An unregulated market would allow promoters to become even more involved in the secondary ticket market. Even with regulation, primary ticket sellers have been leaking into the secondary ticket market. The result is that primary ticket sellers enjoy increased profits made on secondary ticket sales, thereby reducing the profits of other secondary ticket sellers. The elimination of regulation would continue to support this trend. Further, consumers can also benefit from an unregulated market. As previously discussed, a secondary ticket market can sometimes allow consumers to purchase tickets at prices below face value. An unregulated market, therefore, can offer benefits to promoters and consumers—benefits the statutes attempt to offer but do not deliver.

This is not to say that an unregulated secondary ticket market is an ideal market. Most notably, while offering below face value prices in some instances, an unregulated market can also create high prices for events with especially high demand. The consequence of this is the creation of an elite class of consumers who can afford the high prices, thereby minimizing the number of people that can attend popular sporting events and concerts. While this might be ideal under market

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224. See, e.g., 720 ILL. COMP. STAT. 375/1.5 (2008) (requiring ticket brokers to pay an annual registration fee of \$100); see also ALA. CODE § 40-12-167 (2005) (requiring any person who sells a ticket at a price above face value to pay a \$100 license tax).

economics, most fans would agree that it is not ideal. Admittedly, strict legislation, if combined with firm enforcement, would eliminate the elite class of buyers on the secondary market by prohibiting the resale of tickets at exorbitant prices. But the negatives that accompany such legislation weigh against its implementation, especially when combined with the positives of an open market. Even absent the negatives of the legislation and positives of an open market, the legislation simply struggles to be effective at what it aims to do. Therefore, an unregulated ticket market—although not perfect—is the superior option when compared to heavy regulation. Consequently, any action taken in the ticket market should keep the secondary ticket market free of legislation while also minimizing the problems that could arise in an unregulated market.

The best way to achieve a desirable secondary ticket market is by giving promoters the burden of taking action. One proposed solution is for promoters to delay selling tickets until closer to the event date. Currently, it is common for tickets to go on sale long before events are scheduled to occur.<sup>225</sup> By making tickets available only a day or two ahead of time, the promoter would be creating a smaller window in which tickets can be scalped. This would also allow a promoter to more accurately price tickets, because price is tied to demand, and the promoter can better ascertain demand for an event that is scheduled to occur in a few days as compared to an event that is scheduled to occur in months. By pricing tickets more accurately, the promoter can fend off scalpers who are able to sell tickets on the secondary market when their face value is below their market value.

This solution, while able to reduce the occurrence of ticket scalping, is imperfect. First, as mentioned previously, selling tickets the day of the event creates congestion and nuisance issues. Second, promoters will argue that they are taking a significant risk by waiting until the event day to sell tickets. The current practice of selling tickets ahead of time allows promoters to hedge against lost interest as the date nears. But by hedging that risk, promoters are creating a larger window in which scalping can occur. Therefore, the burden should be on promoters to find an appropriate balance between selling tickets early enough to avoid reduced sales when demand decreases and selling tickets late enough that the opportunity to scalp is minimized.

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225. This is the case for a number of reasons: (1) it avoids the congestion that would occur if tickets were sold only on the day of the event; (2) it makes tickets available to a larger consumer base; and (3) it allows the promoters to sell more tickets than they would sell if tickets are sold only on the day of an event and if the event becomes unpopular.

Another proposed solution is for promoters to use the secondary market to more accurately predict and price their primary tickets. This would be especially useful for promoters who sell tickets to recurring events, such as sporting events. By studying past prices on the secondary market, promoters can better gauge the true market value of tickets.<sup>226</sup> This would reduce the number of tickets being scalped because scalpers take advantage of a difference in market price and ticket price—when there is high demand for an event, scalpers are able to sell the ticket in excess of its face value. But if promoters were to increase primary ticket prices in response to a strong secondary market, there would be no price discrepancy for scalpers to exploit. Like the first proposed solution, this one also puts the burden on the promoter.

Presumably, promoters will fear that increasing primary ticket prices will cause a reduction in primary ticket sales. But this should not be the case. Instead, setting primary prices equal to secondary prices would just create a shift in who sells the tickets, not in how many people buy tickets. A consumer willing to pay a scalper \$25 for a ticket that was originally priced at \$15 should be just as willing to pay \$25 to the promoter for the same ticket.

Although this solution could reduce ticket scalping, it also has its flaws. An increase in primary ticket prices does nothing to eliminate the elite class of ticket buyers that would exist in an unregulated market. In an unregulated market, the “average fan” can purchase primary tickets at face value, while the elite class dominates the secondary market for high-demand events. In a scenario where primary prices match secondary prices, the elite class would take over the primary ticket market as well. This is an unenviable scenario for many promoters who prefer a mix of fans. Moreover, setting price based on the secondary market involves some risk that a promoter has the ability to accurately read the secondary market and to price accordingly.

A third proposed solution—often referred to as “scaling the house”<sup>227</sup>—is a form of variable pricing that is tied to consumer demand. In one form of variable pricing, promoters charge higher prices for the especially popular games, such as night games, weekend games, or late-season games, and lower prices for less popular games, such as a weekday games or afternoon games.<sup>228</sup> In the other form of

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226. This practice has already been adopted by at least one professional sports team. See Lewis, *supra* note 116.

227. Happel & Jennings, *supra* note 181, at 75; Yang, *supra* note 4, at 123.

228. Yang, *supra* note 4, at 123.

variable pricing, promoters charge a range of prices for tickets to the same event, depending on the location of the seat.<sup>229</sup> In either form, promoters make pricing decisions based on their anticipation of consumer demand. The result is a pricing system that alleviates several problems that might develop in the unregulated market. First, such a system reduces ticket scalping because, like the preceding solution, tickets for games with high demand will have a face value more accurately tied to market value. Therefore, the scalper's ability to exploit the gap between face value and market price is reduced. And unlike the previous solution, this solution will not polarize the fan base because variable pricing ensures that some tickets—both in “bad” locations and to “bad” games—will be available at reasonable prices, although tickets for the “good” seats and to “good” games will be available only to the elite.<sup>230</sup> However, the success of a variable pricing model also depends on the promoter having sufficient information to price tickets in accordance with demand.<sup>231</sup>

## V. CONCLUSION

Millions of people have used a website to purchase tickets to an event. This is just part of the drastic evolution that the primary and secondary ticket markets have undergone in recent years. The rise of the Internet offers ticket holders a vast universe to resell tickets and allows primary ticket sellers the ability to enter the secondary ticket market. The secondary ticket market has also led to price increases in the primary ticket market.<sup>232</sup> When anti-ticket scalping legislation was passed in many states, these shifts in the primary and secondary ticket markets had yet to occur, and it was unforeseen how the developments would render the statutes moot. These statutes, aimed in part at protecting promoters from ticket scalping, lose their meaning when promoters are active participants in the scalping market. Likewise, these statutes, aimed in part at protecting consumers from nuisance, were rendered virtually meaningless when the ticket scalping market shifted away from face-to-face sales and toward Internet sales. Finally, these statutes, aimed in part at protecting consumers from paying high ticket prices, fail to consider that artificially controlling prices in the ticket market prevents consumers from receiving reasonable ticket prices, sometimes prices below face value, when the natural market calls for it.

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229. See Happel & Jennings, *supra* note 181, at 75.

230. See *id.*

231. *Id.*

232. See Rohan & Park, *supra* note 115, at A1; Lewis, *supra* note 116.

This is not to say that an unregulated market is perfect, but it does mean that an unregulated market is preferred to a statutorily-controlled market. The problems that would exist in an unregulated market—namely, the potential for higher prices and the development of an elite fan base—are not so great that federal legislation should be called on to eliminate these problems and in the process eliminate the positives that an unregulated market provides. Instead, promoters should bear the burden of enacting creative pricing models that let the unregulated market flourish while minimizing the leftover problems of such a market.

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